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In the Supreme Court of the United States

OCTOBER TERM, 1977

THE SCHOOL DISTRICT OF OMAHA,
STATE OF NEBRASKA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals on remand from this Court (Pet. App. 175-178) is not yet reported. The opinion of the court of appeals on the issue of relief (Pet. App. 172-175) is reported at 541 F. 2d 708. The opinion of the district court on petitioners' motion for a new trial (Pet. App. 165-169) is not reported. The opinion of the district court on the issue of relief (Pet. App. 139-145) is reported at 418 F. Supp. 22. The opinion of the court of appeals on the issue of liability (Pet. App. 100-133) is reported at 521 F. 2d 530. The opinion of the district court on the issue of liability (Pet. App. 41-98) is reported at 389 F. Supp. 293. The opinion of the district court on

the motion to intervene (Pet. App. 34-40) is reported at 367 F. Supp. 198. The district court's opinion on the motion for a preliminary injunction (Pet. App. 1-33) is reported at 367 F. Supp. 179.

JURISDICTION

The judgment of the court of appeals (Pet. App. 175-178) was entered on October 21, 1977. The petition for a writ of certiorari was filed on November 22, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly ruled that the evidence demonstrated that the School District of Omaha had engaged in racial discrimination affecting the operation of the schools.

STATEMENT

The United States instituted this school desegregation suit in the United States District Court for the District of Nebraska pursuant to Section 407 of the Civil Rights Act of 1964, 78 Stat. 248, 42 U.S.C. 2000c-6, and filed a motion for a preliminary injunction. On August 31, 1973, the district court denied that motion (Pet. App. 1-34). Thereafter, black students were permitted to intervene as class plaintiffs-intervenors. After trial on the merits, the district court, on October 15, 1974, issued an opinion and order dismissing the suit (Pet. App. 41-99).

It was apparent at the time of trial that there was substantial racial disparity in the student attendance patterns of the Omaha schools. The central question presented, therefore, was whether the School District had engaged in intentional racial discrimination that brought about or maintained that condition (Pet. App. 43). The

district court ruled that the United States had failed to meet its burden of proving that the racial separation in the Omaha schools was the result of intentional racial discrimination on the part of petitioners (Pet. App. 97).

The court of appeals reversed. It held that the United States had established that school officials had engaged in a pattern of acts in five different decision-making areas that had the natural, probable and foreseeable consequence of bringing about more racial separation in the Omaha schools than would have been caused by neutral actions (Pet. App. 110-129), and that the School District had failed to rebut the presumption of discriminatory intent that arose from its actions (*id.* at 107-110). The court of appeals relied on evidence establishing that the School District: (1) intentionally assigned black faculty members to identifiably black schools and white faculty members to identifiably white schools, thus intensifying the racial identifiability of the schools (*id.* at 110-113); (2) maintained a student transfer policy that the School District knew had the natural and foreseeable effect of allowing white students to leave the predominantly black schools in the system (*id.* at 114-117);[1] (3) established "optional" attendance zones designed to allow white students to avoid being assigned to predominantly black schools, as they would have been if the usual "neighborhood school" policy had been adhered to (*id.* at 118-122), (4) constructed schools so located that they almost always opened identifiably "black" or "white" (*id.* at 123-124); and (5) knowingly took actions that had the "inevitable" effect of creating an overwhelmingly black high school in a white neighborhood of Omaha (*id.* at 124-129).

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[1] As a result of this policy, adopted in 1964, more than 60 percent of the white students assigned to predominantly black junior schools in 1970-1972 transferred out (Pet. App. 116).

As to the School District's contention that it had consistently maintained a neighborhood school policy, the court of appeals stated (Pet. App. 124 n. 28):

> [T]he school district had no such consistent policy with respect to the black schools in Omaha and the schools on the fringe of the black community. Time and again, the policy—if one existed—was discarded whenever it would have had an integrative effect: the defendants riddled it with exceptions, including a virtually automatic transfer policy, optional attendance zones in fringe communities, a shared attendance zone precluding anyone from being compelled to attend the only black high school (Tech), and geographically suspect assignment practices for predominantly black King Middle Schools [sic]. It is an understatement to say, as the Supreme Court found in *Keyes* v. *School District No. 1*, [413 U.S. 189,] 212, that "the 'neighborhood school' concept has not been maintained free of manipulation."

The court of appeals ordered that the faculty be fully integrated by the opening of the 1975-1976 school year and that students be reassigned no later than the 1976-1977 school year (Pet. App. 129-130). The court articulated a set of guidelines to aid the School District in carrying out its responsibility for developing and implementing a comprehensive plan for achieving student reassignment (*id.* at 130-132, 136-137).

The School District filed a petition for a writ of certiorari challenging both the holding that the District had engaged in intentional segregation and the remedial guidelines articulated by the court. This Court denied the petition. 423 U.S. 946.

On remand in the district court, the School District submitted a comprehensive remedial plan. On April 27, 1976, the district court issued an opinion (Pet. App. 139-145) that the School District's plan, as modified by amendments proposed by the United States, be adopted; on May 24, 1976, the court ordered its implementation (*id.* at 146).

Both plaintiff-intervenors and the School District appealed. The court of appeals *en banc* affirmed after reexamining its earlier opinion in light of *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, and *Washington* v. *Davis*, 426 U.S. 229 (Pet. App. 173-174).

The School District again filed a petition for a writ of certiorari challenging both the holding that the District had engaged in intentional segregation and the remedial plan. This Court granted certiorari, vacated the judgment of the court of appeals, and remanded for reconsideration in light of *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, and *Dayton Board of Education* v. *Brinkman*, No. 76-539, decided June 27, 1977. See *School District of Omaha* v. *United States*, No. 76-705, decided June 29, 1977.

On remand, after full briefing and oral argument, the court of appeals *en banc* reexamined its holding that the School District had engaged in intentional discrimination and "conclude[d] that the evidence is clear that a discriminatory purpose has been a motivating factor in the School District's actions • • • as outlined in *Omaha* [521 F. 2d 530], because the natural and foreseeable consequence of the acts of the School District was to create and maintain segregation in five different areas, which evidence was not effectively rebutted by the School

District" (Pet. App. 177). The court of appeals then remanded the case to the district court to reexamine the scope of the remedy in light of *Dayton*.

ARGUMENT

The decision of the court of appeals is correct, and further review is not warranted.

Petitioners contend that the holding of the court of appeals on the standard for proving discriminatory intent is inconsistent with *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189; *Washington* v. *Davis*, 426 U.S. 229; *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, and decisions of the Ninth Circuit. We disagree. Although the issue decided in *Keyes* is not directly presented here,[2] the Court's reasoning in that case is applicable (413 U.S. at 209-210):

> In the context of racial segregation in public education, the courts, including this Court, have recognized a variety of situations in which "fairness" and "policy" require state authorities to bear the burden of explaining actions or conditions which appear to be racially motivated. Thus, in *Swann*, 402 U.S., at 18, we observed that in a system with a "history of segregation," "where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment,

[2]In *Keyes* this Court held that proof of intentional segregation of the schools in one area of a school system creates a presumption that other racial separation in the system's schools is the result of intentional racial discrimination. The burden then rests on the school officials to establish that "segregative intent was not among the factors that motivated their actions" (413 U.S. at 210).

> or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection clause is shown." * * * Nor is this burden-shifting principle limited to former statutory dual systems.

Cf. *Monroe* v. *Pape*, 365 U.S. 167, 187.

Where, as here, the plaintiffs have established that school officials have over a period of time taken actions that systematically deviated from normal school practices and that have had the probable, natural, and foreseeable effect of creating more racial separation in the schools than would have existed as a result of adherence to normal practices, it is reasonable and proper to require those school officials to come forward with evidence to establish that their action "was a consistent and resolute application of racially neutral policies." *Oliver* v. *Michigan State Board of Education*, 508 F. 2d 178, 182 (C.A. 6), certiorari denied, 421 U.S. 963.[3]

There is a substantial degree of racial imbalance in the public schools of Omaha (Pet. App. 43, 101, 106), and it is clear that the decisions of the School District have had a racially disproportionate effect. The parties, the district court, and the court of appeals have been aware that discriminatory intent usually must be inferred (if it is to be found at all) from the actions of the school officials

[3]See *Milliken* v. *Bradley*, 418 U.S. 717, 738 n. 18, where this Court approved the district court's findings of unconstitutional segregation within Detroit. Those findings were based on a consideration of the natural, probable, and foreseeable consequences of school board actions. See *Bradley* v. *Milliken*, 338 F. Supp. 582, 587, 592 (E.D. Mich.).

(Pet. App. 43, 106). But in analyzing the proof presented on the issue of intent the district court did not consider the cumulative effect of the evidence in the way *Arlington Heights* requires. The district court compartmentalized the evidence and, viewing the evidence concerning each School District act or policy in a vacuum, never considered whether they formed a pattern uniformly tending to maximize the amount of racial separation. The district court neglected to consider how each act or policy related to other acts or policies of the School District, and whether the acts as a whole demonstrated that race was a motivating factor in the School District's decisions.

In reversing, the court of appeals anticipated and applied the standard articulated by this Court in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp., supra,* 429 U.S. at 266-268, for determining whether racial considerations were a "motivating factor" in the School District's decisions. The court of appeals carefully analyzed all of the evidence, conducting "a sensitive inquiry into such circumstantial and direct evidence of intent as [was] * * * available" (429 U.S. at 266).

The court of appeals relied heavily on direct evidence of overt racial intent as well as on the historical context of the school board's actions. The court of appeals identified five different areas in which the School District's decisions both deviated from normal School District policy and had a foreseeable racially disproportionate effect. It examined whether the School District's student assignment policies could be explained on nondiscriminatory grounds; it determined that the School District had deviated from its "normal" neighborhood school policy whenever the deviation would produce greater racial separation (Pet. App. 114-122, 124 n. 28). It found a pattern of teacher

assignments and school construction decisions that could be explained only by the conclusion that racial factors were a major if not the predominant concern of the School District (*id.* at 110-113, 123-124). It concluded that the School District had not rebutted the presumption of discriminatory intent arising from these circumstances.

Petitioners apparently contend that this approach is inconsistent with *Davis* and *Arlington Heights*, but they are wrong. "*Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes." *Arlington Heights, supra,* 429 U.S. at 265. "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts * * *." *Davis, supra,* 426 U.S. at 242. This is what the court of appeals did here, and correctly so.

There is no need for further review in this case. The court of appeals has twice reexamined its liability decision and, sitting *en banc,* has twice unanimously found it to be consistent with the decisions of this Court. There is no divergence among the courts of appeals concerning the standard of proof of discriminatory intent. Whatever differences of opinion predated *Washington* v. *Davis* and *Village of Arlington Heights* necessarily have been resolved by this Court's more recent decisions, and no conflict has arisen since then.[4] The Ninth Circuit cases relied on by petitioners (Pet. 24) are entirely consistent with the position of the court of appeals here.[5]

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[4]See *United States* v. *Texas Education Agency (Austin Independent School District),* 564 F. 2d 162 (C.A. 5); *National Association for the Advancement of Colored People* v. *Lansing Board of Education,* 559 F. 2d 1042 (C.A. 6), certiorari denied, No. 77-600, December 12, 1977. Both of these recent cases are consistent with *Arlington Heights* and the views of the court of appeals in the present case.

[5]The Ninth Circuit's decisions in *Soria* v. *Oxnard School District Board of Trustees,* 488 F. 2d 579, *Johnson* v. *San Francisco Unified School District,* 500 F. 2d 349, and *Berkelman* v. *San Francisco*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Unified School District, 501 F. 2d 1264, do not conflict with this case. In *Soria*, the plaintiffs argued that discriminatory intent could be inferred from the foreseeable consequences of the school board's acts. The court of appeals did not reject that proposition; it held only that when the school board is prepared to present evidence showing that it did not intentionally discriminate, there is a disputed issue of material fact that precludes the granting of summary judgment for the plaintiffs. In *Johnson*, the district court treated proof of discriminatory intent as unnecessary in a school desegregation case, and the court of appeals reversed on the authority of this Court's decision in *Keyes* and its earlier decision in *Soria*. Finally, there is no indication in *Berkelman* that it was foreseeable, natural, or probable that the school board's decision would have the effect of excluding a disproportionate number of minority students from the school in question. In any event, as we pointed out in the text, any conflict among the circuits that may have predated *Village of Arlington Heights* is now of no more than academic interest.